

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JANET R. LEWIS

Claimant

VS.

**KANSAS GAS SERVICE dba
ONEOK, INC.**

Self-Insured Respondent

Docket No. 1,016,768

ORDER

Respondent requests review of the October 26, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) Brad E. Avery.

ISSUES

The ALJ found claimant sustained an accidental injury arising out of and in the course of her employment with respondent. Accordingly, he granted her request for temporary total disability compensation at the rate of \$440 per week commencing May 19, 2004 to September 16, 2004.

The respondent appeals the ALJ's preliminary hearing Order alleging claimant has failed to establish she sustained an accidental injury as a result of her work activities. Respondent contends that claimant's change in work schedule, moving from the night shift to the day shift, is not responsible for her increased bilateral upper extremity pain complaints beginning in the fall of 2003. Rather, it was the fact that she had increased responsibilities taking care of her five grandchildren that have given rise to her present complaints of pain. Moreover, respondent contends claimant admits she was working only sporadically beginning in the fall of 2003, taking FMLA to tend to her own health needs and to care for her grandchildren. Thus, respondent maintains claimant's work activities cannot be seen as the source of her ongoing pain complaints.

Respondent further argues that the ALJ exceeded his jurisdiction and inappropriately awarded claimant temporary total disability benefits. Respondent asserts that “[u]nless a physician has opined that a [c]laimant is not to work, an injured worker is not entitled to temporary total disability.”¹

Claimant argues that she has sustained her burden of proof to show personal injury by accident arising out of and in the course of employment. Claimant also argues that the Board does not have jurisdiction to consider whether the ALJ properly granted temporary total disability compensation.

The issues to be determined are as follows:

1. Whether claimant sustained an accidental injury;
2. Whether claimant’s accidental injury arose out of and in the course of her employment; and
3. Whether the ALJ exceeded his jurisdiction in awarding claimant temporary total disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a service representative for respondent. Her job duties included answering telephone calls from customers and recording or retrieving information into a computer. She would also have to write certain information down during this process.

In 1999, claimant asserted a workers compensation claim against respondent for bilateral carpal tunnel syndrome. She was treated by Dr. Michael Schmidt and had surgery first on the left wrist in October 1999, then on the right wrist in December 1999. Following her recovery claimant was released by both the treating physician and her own examining physician, Dr. Edward J. Prostic, to return to work at her regular duties.

Sometime in 2003, claimant began to experience an increase in her bilateral upper extremity pain. While her testimony is, at best, ambiguous, she attributes this increase to her change from the night shift to the day shift. When questioned by her attorney, claimant testified that the increase in symptoms began in October 2003, at the same time she

¹ Respondent’s Brief at 5 (filed Nov. 12, 2004).

switched to the more fast-paced day shift.² However, claimant admits she was not consistently working during the fall of 2003 as she was tending to her grandchildren as well as her own health needs (for an unrelated condition). When the ALJ questioned claimant, she testified that her hands began worsening in the “[l]atter part of 2002” with cramping and swelling.³ She went on to say that the tingling and pain did not begin until 2003 and the symptoms were worse in the winter months, but would lessen in the warmer months.⁴

Claimant reported these problems to her employer and she was referred to Dr. Schmidt for further treatment in February 2004. She was taken off work for a period of time and conservative treatment was offered. At about this same time, claimant took off work to tend to her other, unrelated personal health conditions. She was off work a significant period of time, but her hands continued to bother her.

On March 19, 2004, Dr. Schmidt issued the following restrictions:

I recommend she not engage in activities requiring prolonged or repetitive use of either hand. Lifting should be limited to no more than 15 lbs. Use of wrist splint might be useful when doing any short-term strenuous activities.⁵

Dr. Schmidt also released claimant from his care as of this date as he believed her to be at maximum medical improvement and that no further treatment was indicated.

Respondent could not accommodate these restrictions and following a meeting between claimant, respondent and a union representative, claimant was placed on a leave of absence pending application for long term disability benefits. Those benefits were awarded September 17, 2004.

Claimant then sought a second opinion from Dr. Prostic, a physician who had evaluated her in connection with her earlier claim. He examined claimant on May 19, 2004 and determined she had sustained an aggravation of her preexisting condition and suggested additional treatment, at least for her left upper extremity as that extremity was causing her the most pain complaints. He also provided her with a permanent impairment rating. Dr. Prostic did not take claimant off work, but he did concur with the restrictions imposed by Dr. Schmidt.

² P.H. Trans. at 6-7.

³ *Id.* at 51.

⁴ *Id.* at 52.

⁵ *Id.*, Cl. Ex. 2 at 7 (Report of Dr. Michael Schmidt dated March 19, 2004).

The ALJ concluded claimant sustained an accidental injury arising out of and in the course of her employment. The Board agrees, by the barest of margins, that claimant has met her burden of proof. It is uncontroverted that the day shift to which claimant was assigned was a faster-paced environment and required her to use her hands more consistently. While claimant is less than clear about the precise onset of her increased symptoms and how often she was working during 2003, that is not surprising given the diffuse nature of those complaints and the other personal issues she was dealing with during 2003 and into 2004. Nonetheless, both physicians who have treated or evaluated claimant concur that she is suffering from repetitive use syndrome, and although Dr. Schmidt's records are silent on the issue of causation, Dr. Prostic has attributed this aggravation of her preexisting bilateral condition to her work activities. Claimant also attributes her increased symptoms, admittedly somewhat cryptically, to the change in her work assignment. The fact that an injury might have been preexisting is no bar to compensation if the work-related injury aggravated the preexisting injury.⁶ Accordingly, the Board affirms the ALJ's conclusion that claimant sustained her burden of proving an accidental injury arising out of and the course of her employment with respondent.

The ALJ also granted claimant temporary total disability benefits for the period May 19, 2004 (the date of Dr. Prostic's report) to September 16, 2004 (the date claimant's long-term disability payments began). Respondent maintains the ALJ exceeded his jurisdiction in awarding these benefits because no physician has taken claimant off work. Conversely, claimant asserts that the ALJ did not exceed his jurisdiction and the issue of temporary total disability benefits is not within the Board's jurisdiction.

The Board's jurisdiction to review preliminary hearing findings is statutorily created by K.S.A. 44-534a. The statute provides the Board may review those preliminary findings pertaining to the following: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; and (4) whether certain defenses apply. The Board also has jurisdiction to review preliminary hearing findings if it is alleged the administrative law judge exceeded his or her jurisdiction. See K.S.A. 44-551(b)(2)(A).

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁷

⁶ *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 121, 959 P.2d 469 (1998), *rev. denied* 265 Kan. 884 (1998).

⁷ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

The Board does not have jurisdiction to consider the issue of temporary total disability benefits arising out of a preliminary hearing Order, nor does the Board find the ALJ exceeded his jurisdiction in granting such benefits in this instance.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated October 26, 2004, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of December 2004.

BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Larry G. Karns, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director